



ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OGC-2022-0683; FRL-10129-01-OGC]

Proposed Settlement, Clean Water Act Claim

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed settlement; request for public comment.

SUMMARY: In accordance with the Environmental Protection Agency (EPA) Administrator's March 18, 2022, memorandum regarding "Consent Decrees and Settlement Agreements to resolve Environmental Claims Against the Agency," notice is hereby given of a proposed settlement in *Northwest Environmental Advocates, et al., v. US EPA*, No. 1:13-cv-263 (D. Idaho). On September 24, 2013, the Northwest Environmental Advocates and the Idaho Conservation League (collectively "Plaintiffs") filed an amended complaint against the EPA alleging, among other things, that the Agency had failed to complete its mandatory duty under the Clean Water Act ("CWA") to prepare and publish proposed water quality standards for mercury pollution to protect aquatic life following its disapproval of related water quality standard revisions by the State in 2008. On July 19, 2021, the Court issued a ruling concluding that, under the circumstances of this case, EPA's disapproval created a mandatory duty for the Agency to promulgate new criteria for the State. Having ruled against EPA on liability, the Court directed the parties to file briefs regarding an appropriate remedy. EPA seeks public input on a proposed stipulated order on remedy ("Proposed Order") prior to its final decision-making to settle the remedy portion of the litigation.

DATES: Written comments on the Proposed Order must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OGC-2022-0683 online at <https://www.regulations.gov> (EPA's preferred method). Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID number for this action.

Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on sending comments, see the “Additional Information About Commenting on the Proposed Settlement” heading under the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Thomas Glazer, Water Law Office (2355A), Office of General Counsel, U.S. Environmental Protection Agency; telephone: (202) 564-0908; email address: glazer.thomas@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement

On June 15, 2013, Plaintiffs filed suit in the Federal district court for the District of Idaho against the Fish and Wildlife Service and the National Marine Fisheries Service (collectively, “the Services”). The complaint alleged that the Services unreasonably delayed or unlawfully withheld completion of Endangered Species Act (“ESA”) consultation with EPA regarding new and revised water quality standards that were submitted in 1996 and/or 1997. On September 24, 2013, Plaintiffs filed an amended complaint adding various CWA and ESA claims against EPA regarding dozens of Idaho water quality standard submissions dating back to 1994. Broadly speaking, Plaintiffs’ claims fell into two categories: claims that EPA failed to consult with the Services on various water quality standard approval actions and claims that EPA failed to complete its mandatory duties under the CWA with respect to various new and revised water quality standards adopted by the State. In April 2015, the Services entered a stipulated dismissal with Plaintiffs by which they agreed to complete certain ESA obligations. This left EPA as the sole defendant in the case.

On February 28, 2019, the Court partially granted EPA’s motion to dismiss a number of claims on statute of limitations grounds. On January 21, 2021, the Court entered a stipulated order of partial dismissal, which resolved all but one remaining claim against EPA: that EPA

failed to act under section 303(c)(4) of the CWA to promulgate aquatic life mercury criteria following EPA's December 12, 2008, disapproval of State revisions to its existing mercury criteria. On July 19, 2021, the Court held that, under the circumstances of this case, EPA's disapproval created a mandatory duty for the Agency to promulgate new criteria for the State. *See Nw. Env't Advocs. v. United States Env't Prot. Agency*, 549 F. Supp. 3d 1218 (D. Idaho 2021).

The parties have negotiated a settlement framework regarding an appropriate remedy in the form of a stipulated order on remedy. Pursuant to the agreed-upon terms, EPA would sign for publication in the *Federal Register* proposed aquatic life mercury criteria for the State of Idaho within 18 months of entry of the Proposed Order with the Court. EPA would have nine months after publication to (1) determine whether ESA section 7 consultation with the Services is required and (2) initiate any such consultation. If consultation occurs, EPA would have to finalize the criteria within eight months of the conclusion of that consultation. Alternatively, if EPA determines that consultation is not required, EPA would have to notify the Plaintiffs and finalize the criteria within eight months of that determination. As part of the agreement, EPA would include in its proposal water column concentrations, or default water column values that can be modified on a case-by-case basis, if EPA determines there are sufficient data available to support this form of criteria. If EPA declines to propose water column concentrations or default water column values, then it would explain and take comment on its reasoning for not doing so. EPA's commitment to promulgate these criteria will be null and void if the State adopts and EPA approves new aquatic life mercury criteria.

For a period of thirty (30) days following the date of publication of this notice, EPA will accept written comments relating to the Proposed Order from persons who are not parties to the litigation. EPA also may hold a public hearing on whether to enter into the Proposed Order. EPA or the Department of Justice may withdraw or withhold consent to the Proposed Order if the comments received disclose facts or considerations that indicate that such consent is

inappropriate, improper, inadequate, or inconsistent with the requirements of the Clean Water Act.

II. Additional Information About Commenting on the Proposed Settlement

A. How can I get a copy of the proposed settlement?

The official public docket for this action (identified by Docket ID No. EPA-HQ-OGC-2022-0683) contains a copy of the Proposed Order. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OEI Docket is (202) 566-1752.

The electronic version of the public docket for this action contains a copy of the Proposed Order and is available through <https://www.regulations.gov>. You may use <https://www.regulations.gov> to submit or view public comments, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select “search.”

B. How and to whom do I submit comments?

Submit your comments, identified by Docket ID No. EPA-HQ-OGC-2022-0683 via <https://www.regulations.gov>. Once submitted, comments cannot be edited or removed from this docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the

primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>. For additional information about submitting information identified as CBI, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the <https://www.regulations.gov> website to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an “anonymous access” system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment.

Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked “late.” EPA is not required to consider these late comments.

Steven Neugeboren,

Associate General Counsel.

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